



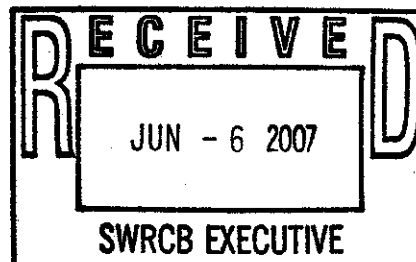
6/19/07 BdMtg Item 10
 WR Enforcement
 Deadline: 6/6/07 Noon

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 (1929-2002)

June 6, 2007

Song Her, Clerk of the Board
 State Water Resources Control Board
 1001 I Street
 Sacramento, CA 95814



**Re: Workshop to Receive Information Regarding Policy Direction on
 Water Right Enforcement**

Dear Ms. Her:

On May 3, 2007, the State Water Resources Control Board ("State Water Board") issued a revised notice of public workshop. The notice provides that, at a workshop to be held on June 19, 2007, the State Water Board will hear comments regarding policy direction on water right enforcement. The notice invites written comments by June 6, 2007. Pursuant to the invitation, the San Luis & Delta-Mendota Water Authority ("Authority"), on behalf of its member agencies, submits this letter.

The Authority was formed in 1992 as a joint powers authority and has its principal office in Los Banos, California. The Authority consists of 32 member public agencies,¹ each of which contracts with the United States Department of the Interior, Bureau of Reclamation, for supply of Central Valley Project ("CVP") water. The Authority's member agencies are entitled to approximately 2.7 million acre-feet of CVP water for agricultural lands within the western San Joaquin Valley, San Benito County, and Santa

¹ The member agencies of the Authority are: Banta-Carbona Irrigation District; Broadview Water District; Central California Irrigation District; Centinella Water District; City of Tracy; Columbia Canal Company; Del Puerto Water District; Eagle Field Water District; Firebaugh Canal Water District; Fresno Slough Water District; Grassland Water District; James Irrigation District; Laguna Water District; Mercy Springs Water District; Oro Loma Water District; Pacheco Water District; Pajaro Valley Water Management Agency; Panoche Water District; Patterson Water District; Plain View Water District; Pleasant Valley Water District; Reclamation District 1606; San Benito County Water District; San Luis Canal Company; San Luis Water District; Santa Clara Valley Water District; Tranquility Irrigation District; Turner Island Water District; West Side Irrigation District; West Stanislaus Irrigation District; Westlands Water District; and Widren Water District.

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Clara County, California. The Authority's member agencies also supply approximately 200,000 acre-feet of CVP water for municipal and industrial uses and approximately 250,000 to 300,000 acre-feet of CVP water for waterfowl and wildlife habitat.

The State Water Board's notice identified sixteen separate issues. In this letter, the Authority comments on seven of those issues. Before addressing those issues, however, the Authority discusses the two types of primary enforcement actions delegated to the State Water Board's Division of Water Rights. Those actions should be stated clearly in any policy adopted by the State Water Board.

I. The Division of Water Rights' Dual Enforcement Responsibilities

The Water Code reflects the State Legislature's decision to delegate to the State Water Board the responsibility to undertake enforcement actions with respect to two different types of violations related to water rights. The State Water Board may "enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, [and] enforce state board orders and decisions." (Water Code, § 1825.) It may also prevent the unlawful diversion or use of water. (Water Code, § 1052.) The manner in which the State Water Board may pursue those actions is established in sections 1050 *et seq.* and 1831 *et seq.* of the Water Code.

A cease and desist order may issue for "a violation or threatened violation of . . . [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water [or] [a]ny term or condition of a permit, license, certification, or registration. . . ." (Water Code, § 1831.) Civil liability may be imposed where there is an unauthorized diversion or use of water. (Water Code, § 1052.)² In other words, the cease and desist order is an enforcement tool available to either unauthorized diversions or uses and violations of permits, licenses, etc., whereas Administrative Civil Liability is an enforcement tool available only to address unauthorized diversions or uses.

The State Water Board's regulations recognize this distinction. Section 821 of Title 23 of the California Code of Regulations provides, in part:

[I]f, after investigations, the State Water Board's staff finds that a violation of the terms and conditions of any permit or license has occurred which might be cause for enforcement actions by the board, the matter may be

² The Authority recognizes that section 1845 of the Water Code authorizes Administrative Civil Liability as a remedy for breaches of a cease and desist order. However, as explained herein, that "enforcement" action is not available as a primary enforcement tool for a violation of a term or condition of a permit, license, certification, or registration.

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referred to the board for hearing in accordance with the provisions of Water Code Sections 1410 et seq., 1675 et seq., or 1825 et seq.

(Cal. Code Regs, tit. 23, § 821.) The cited Water Code sections address the revocation of permits and licenses and the issuance of cease and desist orders. None of those Water Code sections authorize the imposition of an Administrative Civil Liability in the first instance when there is a violation of a term or condition of a permit, license, certification, or registration.

II. Matters for Discussion in Workshop

- How should the State Water Board set enforcement priorities? What factors should it consider in setting enforcement priorities?
- Currently the State Water Board's Division of Water Rights (Division) identifies one or more watersheds per year in which it will conduct compliance inspections. In the past, watersheds have been selected after consultation with the regional Water Quality Control Boards, the California Department of Fish and Game, and federal fishery agencies. The Division selects the watershed(s) on which it will focus its enforcement resources based on potential impacts to water quality and aquatic resources. The Division then conducts both investigations of unauthorized diversions and compliance inspections of permitted and licensed water supply projects within the selected watershed(s). Should the State Water board continue to focus its water right enforcement resources on specific watersheds? If so, how should those watersheds be selected? If not, what other basis should be used?

The Division of Water Rights should not continue to focus its enforcement resources on a watershed basis. Continued enforcement on that basis may allow serious violations to continue in watersheds deemed low priority by the State Water Board. Instead and because of its limited resources, the Division of Water Rights should use criteria to prioritize the violations notwithstanding the watershed in which the violation occurs. The Authority suggests the following criteria, listed in order of those criterion deserving the greatest weight to those deserving the least weight.

- (1) The likelihood that an alleged violation or grouping of similar, alleged violations may significantly affect beneficial uses (all uses, not just water quality or aquatic resource).

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- (2) The quantity of water allegedly delivered or used unlawfully.
 - (3) Whether the alleged violation or grouping of similar, alleged violations provided significant advantage over water users.
 - (4) Whether the alleged violator was found in violation previously (repeat or continuous violator).
 - (5) Level of intent/knowledge that the action constituted an alleged violation.
 - (6) Whether enforcement is necessary to deter other violators.
- Should the State Water Board provide an opportunity for voluntary compliance or corrective actions before initiating formal enforcement actions and, if so, under what circumstances? How long a time should the State Water Board allow for voluntary compliance?
 - If a Cease and Desist Order is determined to be appropriate, should the State Water Board provide an opportunity in the Cease and Desist Order for the recipient of the order to continue to divert water while coming into compliance? If so, what conditions and time schedule for compliance should the State Water Board impose? What other factors should the State Water board consider in determining a reasonable time schedule for compliance to be included in any Cease and Desist Order?

Yes, the State Water Board should provide an opportunity for compliance or corrective actions before initiating formal enforcement actions, provided the alleged unlawful act has a low enforcement priority (i.e., does not meet many of the prioritization criteria).

- The State Water Board has pending over 500 water right applications. Many of these applications were filed to seek authorization for existing, but unauthorized, water supply projects. Should the State Water Board initiate enforcement against existing applicants that are diverting water without authorization? Under what conditions should the State Water Board initiate enforcement actions against these applicants?
- The State Water Board has pending over 600 petitions to change existing water right permits or licenses. Many of these petitions were filed to seek

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authorization for changes in place or purpose of use or point of diversion that have already taken place without seeking the required prior approval of the change from the State Water Board. Should the State Water Board initiate enforcement against existing petitioners that are diverting water in violation of the conditions of their water right permits or licenses? Under what conditions should the State Water board initiate enforcement actions against these petitioners?

Yes, the State Water Board should maintain the right to initiate enforcement proceedings against existing applicants who divert water prior to receiving authorization. However, not all unlawful diversions should necessarily be pursued. For example, some unlawful diversions exist because of "institutional issues" (backlog of pending requests, limited staffing, etc.). Also, unlawful diversions have differing impacts to beneficial uses. For these reasons, enforcement against existing applicants unlawfully diverting should be prioritized, again using criteria like those set forth above.

- The State Water Board has the authority to issue Administrative Civil Liability (ACL) of up to \$500 per day of unauthorized diversion and use or up to \$1000 per day for violation of a Cease and Desist Order. If an ACL complaint is deemed appropriate, how should the monetary penalty be calculated in order to ensure that the monetary penalty is effective in compelling compliance with water right law? What factors should the State Water Board consider in setting the amount of the monetary penalty?

To prevent unlawful diversions and for violations of cease and desist orders, the State Water Board should calculate the Administrative Civil Liability using criteria similar to those identified in Section II(A) above. They should include:

- The nature, extent, and gravity of the violation.
- The extent of adverse impact to beneficial uses.
- The conduct of the violator (intentional disregard of the law, accidental infraction followed by a quick voluntary compliance, etc.)
- The amount of benefit the violator received from its unlawful conduct.
- Relationship of a proposed Administrative Civil Liability to statutory limits.

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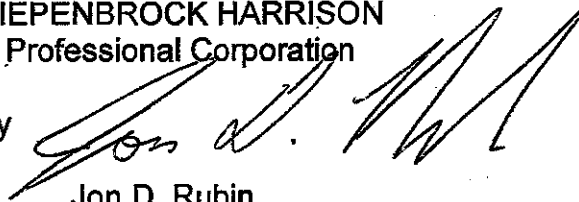
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Thank you for your consideration of these comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By

A handwritten signature in black ink, appearing to read "Jon D. Rubin", is written over the word "By". The signature is stylized with a large, sweeping initial "J" and "R".

Jon D. Rubin
Attorneys for the San Luis & Delta-Mendota
Water Authority

cc: Daniel Nelson
Thomas Birmingham